

Before the  
FEDERAL COMMUNICATIONS COMMISSION  
Washington, DC 20554

In the Matter of )  
 )  
Implementation of Section 309(j) ) PP Docket No. 93-253  
of the Communications Act )  
Competitive Bidding )

To: The Commission

COMMENTS OF  
ASSOCIATION OF AMERICA'S PUBLIC TELEVISION STATIONS

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**COMMENTS OF  
ASSOCIATION OF AMERICA'S PUBLIC TELEVISION STATIONS**

The Association of America's Public Television Stations ("APTS") submits these comments in response to the Commission's Notice of Proposed Rulemaking in PP Docket No. 93-253 (released October 12, 1993) ("Notice") in the above-captioned proceeding. APTS is a nonprofit membership organization whose members are licensees of virtually all of the nation's public television stations. APTS serves as the national representative of these stations, presenting their views and participating in proceedings before Congress and executive and administrative agencies, and in other activities.

**Introduction**

As part of the Omnibus Budget Reconciliation Act of 1993 ("Budget Act"), Congress granted the Federal Communications Commission the authority to use competitive bidding procedures to

issue licenses when (a) mutually exclusive applications have been filed and (b) the principal use of the license will be to offer service in return for compensation from subscribers. Although the section was included in the Budget Act in an effort to raise revenue, the legislation and accompanying conference and committee reports identify other important factors to guide the Commission's licensing decisions. Among those factors are the "development and rapid deployment of new technologies, products, and services for the benefit of the public . . . ." Budget Act, 47 U.S.C. § 309(j)(3)(A).

In addition, both Congress and the Commission have historically provided statutory and regulatory support to encourage the delivery of public telecommunications services. In 1952, the Commission reserved 242 channels on UHF spectrum band for educational television. Television Assignments, Sixth Report and Order, 41 F.C.C. 148 (1952). Since that time, the Commission has added to and protected that reservation to facilitate the delivery of noncommercial program services. Similarly, since 1967, Congress has continually reaffirmed its support for public service programming through authorizing and appropriating funding for services, facilities and distribution systems, and by repeatedly relieving public broadcasters of licensing and communications facilities fees.

In light of this clear and long-standing federal policy supporting public broadcasters as well as the legislative intent of the competitive bidding provisions, APTS submits that the

regulations adopted by the Commission to implement the Budget Act must assure that public broadcasters are afforded continued access to communications spectrum that is excluded from competitive bidding. The proposals submitted by APTS in these Comments are designed to achieve that objective.

**I. The Commission's Regulations Should Specifically Reflect Congress' Intent that Broadcast, ITFS, Broadcast Auxiliary and Subcarrier Services Be Exempt From Competitive Bidding Procedures**

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The Budget Act Conference Report and the incorporated provisions of the Budget Act House Report state that traditional over-the-air broadcast services, Broadcast Auxiliary Services, subcarriers and other services whose signal is indivisible from the main channel signal are to be exempt from competitive bidding procedures.<sup>1/</sup> Although the Notice proposes to exclude broadcast television and radio from the Commission's competitive bidding regulations, it does not also specifically propose to exclude Broadcast Auxiliary Services and subcarriers. Notice at ¶ 23. All of these services were clearly intended by Congress to be excluded, and the Commission's final rules should so state.

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<sup>1/</sup> The House Report states that competitive bidding procedures "should not affect the manner in which the Commission issues licenses for virtually all private services, including frequencies used by Public Safety Services, the Broadcast Auxiliary Service, and other subcarriers and services where the signal is indivisible from the main channel signal." H.R. Rep. No. 103-111 at 253 (incorporated by reference, H. Conf. Rep. 103-213 at 481). H.R. Rep. No. 103-111, 103d Cong., 1st Sess. at 253 (1993); H.R. Conf. Rep. No. 103-213, 103d Cong., 1st Sess. at 481 (1993).

Similarly, the Conference Report states that Instructional Television Fixed Service ("ITFS") is to be exempt from competitive bidding procedures, even where ITFS licensees receive payments from Multichannel Multipoint Distribution Service ("MMDS") providers for leased channels or airtime. H.R. Conf. Rep. No. 103-213 at 481-82. MMDS payments are not to be construed as subscription fees. Id. While the Notice references this section of the Conference Report in a footnote, Notice at n.5, it does not propose to exclude this service in the final rule. APTS requests that the final rule reflect that ITFS licensees are exempt from competitive bidding procedures.

**II. CARS Licenses Should Be Exempt From Competitive Bidding When Used To Upgrade the Signal of a Television Station Received at a Cable Headend**

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The Notice proposes to award by competitive bidding procedures licenses used as an intermediate link in the provision of continuous end-to-end subscription services. Notice at ¶ 29. In a footnote, the Notice indicates that Community Antenna Relay Service ("CARS") would be eligible for competitive bidding inasmuch as cable television systems have paying subscribers. Notice at n.11.

Although CARS stations are licensed to cable companies, they are sometimes used to transmit broadcast signals to a cable headend in circumstances where over-the-air reception of the signal is of inadequate quality. CARS offers a vital service in the delivery of broadcast programming when signal upgrading is required for the station to achieve sufficient signal quality to

qualify for "must-carry" transmission by cable systems.

47 U.S.C. §§ 534, 535. APTS therefore proposes that when an applicant for a CARS license intends to use the license to transmit exempt broadcast services to a cable system, the CARS license likewise should be exempt from the Commission's competitive bidding procedures.<sup>2/</sup>

### **III. Any Competitive Bidding Procedures Adopted for DBS Service Should Exempt the Noncommercial DBS Set-Aside**

The Notice requests comment on whether mass media services other than broadcast television and radio should be subject to competitive bidding, and specifically identifies Direct Broadcast Satellite ("DBS") service as an example. Notice at ¶ 23.

While DBS is a subscriber service, Section 25 of the Cable Television Consumer Protection and Competition Act of 1992 (the "Cable Act") requires that four to seven percent of its capacity be set aside for "noncommercial programming of an educational nature." 47 U.S.C. § 335.<sup>3/</sup> Since the allocation of a portion

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<sup>2/</sup> The Commission has interpreted the legislative history, discussed at n. 1, supra, to exempt other types of broadcast links, including studio-transmitter, remote pickup and ENG links, from competitive bidding procedures. Notice at ¶ 24. When necessary to obtain transmission by cable systems, CARS is at least as important to the provision of broadcast services as auxiliary broadcast licenses.

<sup>3/</sup> This section of the Cable Act was held unconstitutional on First Amendment grounds in Daniels Cablevision, Inc. v. FCC, Civ. Nos. 92-2292, 92-2494, 92-2558, 1993 U.S. Dist LEXIS 12806, at \*20-21 (D.D.C. Sept. 16, 1993). APTS understands that the decision will be appealed by the Government. The Commission should, in devising its competitive bidding rules, fashion rules that consider the DBS set aside in the event this provision is found to be constitutional. For purposes of these Comments, it  
(continued...)

of the capacity for noncommercial use is required by statute, APTS proposes that bidders only be required to pay for the portion of the DBS spectrum that they intend to use for commercial purposes. The Budget Act provides that competitive bidding procedures should be employed to recover for the public "a portion of the value of the public spectrum made available for commercial use" and to avoid "unjust enrichment." See Notice at ¶ 12 (quoting Budget Act, 47 U.S.C. § 309(j)(3)). To the extent that a portion of the DBS spectrum is not intended for commercial use, it is inappropriate to require that DBS applicants pay for that portion. By the same token, no applicant will be "unjustly enriched" if it is not required to pay for that portion of the DBS spectrum it proposes to set aside for noncommercial use.

The Commission can accomplish this by giving each DBS applicant a credit based upon the amount of spectrum it proposes (or is required) to set aside for noncommercial programming. Thus, for example, a DBS applicant that proposes to set aside four percent of its spectrum for noncommercial use would get a credit for four percent of its bid. An applicant proposing a seven percent set-aside would receive a credit of seven percent of its bid. As a result, the applicant who is ultimately awarded the license would not pay for the portion of the spectrum that it sets aside for noncommercial use. This proposal is consistent

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<sup>3/</sup>(...continued)  
is assumed that the provision will ultimately be found constitutionally valid.

with the Commission's requirement that any system it promulgates be "simple and easy to administer." Notice at ¶ 18.

The Commission's treatment of the DBS set aside in this proceeding will also have consequences for the amount a "national educational program supplier" may have to pay to have access to the reserved capacity. Section 25 requires that capacity be made available to suppliers "upon reasonable prices, terms, and conditions, as determined by the Commission . . ." and directs that "the Commission shall not permit such prices to exceed . . . 50 percent of the total direct costs of making such channel available . . . ." 47 U.S.C. § 335.

The issue of what constitutes direct costs is before the Commission in its DBS rulemaking proceeding. DBS Public Service Obligations, MM Docket No. 93-25. While APTS has argued that direct costs should be construed narrowly to exclude all general overhead costs and include only those costs directly related to transmitting the noncommercial signal to the uplink facility and uplinking the signal to the satellite,<sup>4/</sup> the DBS providers argued that all general overhead costs be included in direct costs.

If the Commission adopts the DBS providers' view, and does not protect the DBS set-aside in establishing competitive bidding

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<sup>4/</sup> The House Report on the Cable Act mandates that "direct costs" exclude overhead costs and foregone revenue and include only those costs directly related to making the DBS channel available to the noncommercial program supplier. H.R. Rep. No. 102-628, 102d Cong., 2d Sess. 124-25 (1992); see also H.R. Conf. Rep. No. 102-862, 102d Cong., 2d Sess. 100 (1992).



rules for DBS spectrum, the cost of the DBS spectrum may be included in the direct costs passed along to educational program providers. In this event, noncommercial programmers will likely not be able to afford the access Congress intended for them, thereby frustrating the purpose underlying the set-aside.<sup>5/</sup> Accordingly, APTS strongly urges the Commission to preserve Congress' intent in Section 25 to foster noncommercial access to DBS spectrum by exempting from competitive bidding procedures that portion of the spectrum identified to be set aside for noncommercial programming.

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<sup>5/</sup> Employing auction procedures without protections for the noncommercial DBS spectrum would thus be inconsistent with the Budget Act, which requires the Commission to ensure that auctions promote "the development and rapid deployment of new . . . services for the benefit of the public . . ." Budget Act, Section 1; Notice at ¶ 12.

Conclusion

The Commission should establish regulatory procedures for competitive bidding that protect and foster the development of noncommercial programming by (1) specifically exempting broadcast, Broadcast Auxiliary Services and ITFS; (2) exempting CARS licenses when they are used to transmit broadcast signals to cable systems; and (3) excluding the noncommercial DBS set-aside from any DBS spectrum auctioning.

Respectfully submitted,



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